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No. 758

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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QUESTION 1

The Government's Use of Grand Jury Transcript for Witness Refreshment

The Brief for the United States in Opposition[1] fails entirely to meet or even to discuss petitioner's fundamental position and authorities that a particularized need for limited disclosure to the defense arises when grand jury transcript is used by the prosecution "'to impeach a witness, *to refresh his recollection,* to test his credibility and the like'." *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 399 (1959) (emphasis added); *United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 683 (1958). (See Pet. 10-13).

1. Hereinafter cited "GB. . . ." The Petition for a Writ of Certiorari is cited "Pet. . . ."

The Government admits that when the prosecution uses grand jury transcript for purposes of refreshing a witness' recollection, "defendants have an interest in assuring that testimony developed through its use is not distorted, inaccurate, or the product of improper suggestion. A witness' grand jury testimony may contain passages which contradict, qualify, or explain the passages relied upon by the government" (GB 12). Notwithstanding this admission, and despite the above-quoted statement of principles in *Pittsburgh Plate Glass* and *Procter & Gamble,* the Government takes the position that petitioner was not entitled to limited disclosure of grand jury transcript utilized for refreshment because (1) the requested disclosure involved a "blanket motion for examination of the transcript" (GB-11); (2) the court prescribed and carefully observed certain "safeguards" for the refreshment procedure followed; and (3) the grand jury refreshment procedure involved matters of little importance and the defense was not prejudiced.

1. In its version of the first question presented in this matter (GB 2), and in other instances in its opposing brief (GB 11-14), the Government implies that the defense made a general, over-broad demand to inspect the grand jury transcripts used for witness refreshment. In fact, in each instance, the defense carefully limited its request for disclosure to (1) the portions of the transcript actually read to a particular witness, and (2) additional portions of the testimony of the same witness on the same subject matter (see Pet. A-102-103).[2] Furthermore, contrary to the implication that petitioner wanted to conduct a wholesale "search" through the grand jury transcript (see GB 12-13), defense counsel even went so far as to offer to accept

2. The defense made similar motions, similarly limited, whenever the grand jury transcript refreshment procedure was used (see Pet. A-77, 102-104, 120-21; 127, 157-58, 173, 174-175, 177-79).

Government counsel's designation of other testimony of the witness covering the same subject matter as that disclosed during the refreshment, without further review by the court or defense counsel to ascertain that this was in fact all that was said on the subject.[3]

2. The refreshment procedure adopted by the court as a "safeguard" to petitioner's interests simply involved the trial judge's reviewing designated portions of the transcript to make sure that the designated material was calculated to refresh the witness' recollection; that the statement was not later corrected; and that Government counsel read the designated portions of the transcript accurately and without histrionics (see GB 10-11). There is no indication that the trial judge undertook to analyze the other portions of the witnesses' testimony on the same subject matter to determine if they explained or qualified, or were inconsistent with, the testimony utilized by the prosecution. Indeed, in two instances cited in our petition (p. 13, n. 25), it is clear that the trial judge did not adequately protect petitioner's rights.

But even if the trial judge had undertaken to analyze the grand jury testimony of witnesses who were refreshed in a search for explanatory or qualifying material, this would not adequately protect petitioner's rights. Only counsel for the defense is equipped to undertake this task (see Pet. 12).

In any event, the rights of a defendant in this regard should not be dependent upon the circuit in which he is brought to trial, or the particular trial judge presiding.

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3. The defense stated its willingness "to accept Mr. Jinkinson's [chief counsel for the prosecution] representation to the Court to save the Court the burden of going through the whole thing that this is all the man said on the subject . . ." (R. 427).

In the present case, the trial judge not only denied defense motions for limited disclosure but questioned his right to compel the requested disclosure of appropriate portions of the grand jury transcript (see Pet. 10, n. 19). In marked contrast, Judge R. Dorsey Watkins of the United States District Court for the District of Maryland, under precisely similar circumstances in *United States* v. *H. E. Koontz Creamery, Inc.* (Cr. No. 26128), granted defense requests for limited disclosure of grand jury transcript, stating to Government counsel: "[I]f you use the testimony, then the other side has the right to examine any [relevant] portions. . . . [The witness] may have made one statement at one time and then he may have had a different refreshment which led him to a different conclusion . . . it would seem to me that if you use it for the purpose of seeking to have him testify along the particular line, then the other side is entitled to examine any portions of the testimony bearing upon the same thing."[4]

The restrictive holding by the Court of Appeals for the Eighth Circuit on this point is entirely inconsistent with the more liberal disclosure rules followed in other circuits (see Pet. 12, n. 23). The very fact that conflicting rules are followed in the federal circuits and among different district judges with regard to disclosure of grand jury transcript utilized for witness refreshment provides strong reason for the grant of certiorari in this case. A ruling by

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4. In response to the Government's argument that an effort would be made only to elicit present recollection on a particular point, Judge Watkins stated: "But his present recollection may change to something else two minutes later if he is shown something further. His present recollection does not establish the fact. . . . there may have been some question asked him later on which will lead him to a different present recollection." (Transcript of Hearing, July 13, 1965, pp. 433-35).

this Court on the subject is necessary for uniformity in administration of criminal justice.

3. It ill becomes the Government now to argue that the grand jury refreshment procedure below involved evidence which was merely "cumulative or peripheral" (GB 15). In the trial court and in the Court of Appeals the Government urged that matters as to which grand jury transcript was used for refreshment involved "salient points" which were "critical" to its case (Pet. 14). Moreover, elsewhere in its Brief in Opposition in this Court, the Government has indicated that it was under a "compelling need to use the grand jury minutes" for refreshment (GB 12). And it admitted that the grand jury minutes actually refreshed witnesses' recollections on three occasions, and that on six occasions the witnesses, although not being refreshed, adopted what they had said before the grand jury (G.B. 15).[5] It could hardly be clearer that in these instances petitioner was deprived not only of the privilege of further refreshment of these witnesses' recollections but of its basic right of cross or redirect examination upon points which, precisely because critical to the prosecution, were of the utmost importance to the defense; this right could be effectively exercised only after inspection of the grand jury transcript covering these points.

The basic authority relied upon by the Government is the 1940 decision of this Court in *United States* v. *Socony-*

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5. The Government's statement that in 15 instances where reading of the grand jury transcript did not refresh the witness' recollection, "the matter was at an end" (GB 15), is contrary to the record facts. In many instances where the witness indicated that his recollection was not refreshed, Government counsel repeated the reading of the refreshment material and questioned the witness again and again on the point, coming very close to impeachment (see Pet. 16, n. 28; see also Pet. A-78-80, 91-96, 100-102).

Vacuum Oil Co., 310 U.S. 150 (1940). In our petition, we have shown that that case has no application to the present matter since it involved refreshment only on "minor facts" and testimony which was "either cumulative or dealt only with the minutiae of the conspiracy" (Pet. 14).[6] In a footnote (GB 14, n. 5) the Government suggests that petitioner "does not ask that *Socony-Vacuum* be re-examined." Because it is distinguishable on its facts, such re-examination appears unnecessary. However, to the extent that the holding or the philosophy of *Socony-Vacuum* may be in conflict with the principles more recently set forth in *Pittsburgh Plate Glass* and *Procter & Gamble*, then *Socony-Vacuum* should be re-examined, and this is an additional reason for the grant of certiorari herein.[7]

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6. Making no claim at all that the procedure utilized here was a fair one, the Government urges the need for maintaining the secrecy of grand jury proceedings in order that it may obtain willing witnesses (GB 12). This is a lame argument. Once partial disclosure has been made—*at the Government's own election*—there can be little, if any, difference in the degree of reluctance to testify if this and other testimony concerning the same subject matter is thereafter inspected by defense counsel.

7. Under the heading "The Evidence" in its statement of the case (GB 3-7) the Government set forth what is little more than a paraphrase of the indictment allegations and the Government's bills of particulars, entirely ignoring the substantial evidence that dairies distributing milk in glass gallon jugs were the aggressors in the sporadic price wars here in question, and that petitioner's conduct was defensive rather than predatory, and independent rather than conspiratorial. As the Court of Appeals noted (Pet. A-2), the jury deliberated for nearly 3 days before reaching a verdict in this case. We urge that the one-sided grand jury refreshment procedure may well have swung the balance against petitioner on the 13 counts under which it was found guilty.

QUESTION 2

The Trial Court's Instructions to the Jury on the Robinson-Patman Charges

In its Brief in Opposition, the Government makes no effort to deny or explain its admission in the Court of Appeals that the trial judge erred in his instructions to the jury concerning "cost" (see Pet. 19). Neither does it make any explanation as to why—having assured this Court on the constitutionality appeal that the present indictment charged petitioner with selling at prices below its "own costs of production"—it urged upon the trial court and the Court of Appeals that it was sufficient for it to prove sales at prices below "fully distributed costs" (*ibid*).

On the question of the trial court's charge to the jury on intent, the Government does not deny that the jury was instructed in terms of "general" intent under the Sherman Act counts, and it is unable to cite a single instance where the trial court informed the jury that a different character of proof was required to establish "specific" intent under the Robinson-Patman Act counts. In fact, the trial court instructed but once on *how* the jury was to determine intent (". . . the law presumes that persons must be held to have intended the necessary and direct consequences of their acts . . ."—Pet. A-201, n.). The instruction that a workman causing a death by throwing a beam down into the street "is dealt with as if he foresaw it," and "is guilty of murder" clearly carried the presumed intent concept into the Robinson-Patman counts (see Pet. A-201), and the trial judge's repeated calling of the jury's attention to the alleged "effects" of petitioner's pricing (see Pet. A-204-07) could only heighten the jury's impression that the requisite improper intent could be presumed therefrom.

In arguing that the defense has "the burden of coming

forward with evidence on meeting competition" and that the Government need not "negative . . . possible justifications" (GB 19), Government counsel repudiate entirely the earlier representations to this Court that petitioner was charged with selling "at less than [its] own costs, *without reasonable justification,*" and "[u]nless the government proves this misconduct there must be an acquittal."[8]

In short, the specious arguments now made by the Government in defense of the trial judge's prolix and confusing instructions are a far cry from the unqualified representations concerning the precise elements of the crime charged against petitioner which the Government made to this Court in support of Section 3's constitutionality. Although this Court upheld the constitutionality of Section 3 as applied to the specifically limited charges of the present indictment (see Pet. 5-6), the trial judge's jury instructions permitted conviction of petitioner without proof of either the "below cost" or "specific intent" elements of those charges: the jury was instructed that its "ultimate duty" was to determine whether petitioner's challenged prices "were or were not unreasonably low" (Pet. A-200). The Court of Appeals for the Eighth Circuit, upholding the trial judge's instructions, thereafter adopted a non-objective interpretation of Section 3 which is not only of questionable constitutionality, but broadly departs from the standards laid down by this Court for this case in *United States* v. *National Dairy Products Corporation*, 372 U.S. 29 (1963).[9]

The result is that present guidelines for Section 3—for the district courts as well as for businessmen—are conflict-

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8. Government Brief on Reargument, United States v. National Dairy Products Corporation, No. 18, 1962 Term, p. 18 (emphasis added). See also Pet. 24, n. 50.

9. See Pet. 6-8, 20.

ing and highly confused. Having general application to the subject of pricing, Section 3 bears directly upon the national economy, and its scope and meaning are of the utmost importance. A pronouncement by this Court clarifying the standards governing its application is essential.

CONCLUSION

For all the reasons hereinabove set forth and in the earlier petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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